No. 85654-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 39921-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BUSINESS SERVICES OF AMERICA II, INC.,
assignee of Natkin/Scott, a joint venture,

Appellant/Respondent,

v.

WAFERTECH, L.L.C.,

Respondent/Petitioner.

REPLY BRIEF OF APPELLANT/RESPONDENT BUSINESS SERVICES OF AMERICA II, INC. TO AMICUS BRIEF BY WDTL

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A. Introduction

In this appeal, WaferTech is arguing that CR 41(b)(1), which governs dismissals for "Want of Prosecution on Motion of Party," does not apply to WaferTech's motion "to dismiss the present action for plaintiff's failure to prosecute for over four years after remand." CP 60. The amicus brief by the Washington Defense Trial Lawyers ("WDTL") mainly repeats WaferTech's arguments. This violates RAP 10.3(e), which provides that "[a]micus must review all the briefs on file and avoid repetition of matters in other briefs."

In echoing WaferTech, WDTL joins WaferTech in two fundamental errors. First, it ignores the overriding purpose of the civil rules, and even the reason we have civil courts: to resolve disputes on their merits. Instead, WDTL views civil actions as pests to be exterminated by trial courts, regardless of the impact on plaintiffs with valid claims.

For defendants, for whom WDTL is a mouthpiece, that would be a wonderful system. For plaintiffs who have suffered some harm for which they seek redress in the courts, and for society in general, not so much.

Second, WDTL ignores the facts in the record that contradict its arguments, and more importantly, the lack of facts in the record that would be needed to support its arguments.

One exception to WDTL's rehash of issues is that it does not argue CR 41(b)(1) does not apply to civil actions after an appeal and remand, as WaferTech does in § IV.B of its Supplemental Brief. That is an issue not raised in the Petition for Review. According to RAP 13.7(b), the Supreme Court will not review that issue.

The second exception is that WDTL asserts the doctrine of judicial estoppel supports the trial court's dismissal of BSA's lien claim. However, judicial estoppel, an evidentiary rule to bar factual testimony in a second action which is clearly inconsistent with prior sworn testimony from the same party in a prior action, is not applicable to this action.

A potential new argument WDTL did not make is that existing case law interpreting and applying CR 41(b)(1) should be overruled or distinguished. That case law is clear that as long as a party has not engaged in "unacceptable litigation practices" egregious enough to warrant the ultimate sanction of dismissal as a punishment, CR 41(b)(1) governs dismissals for delay.

As to WDTL's rehash of issues briefed by WaferTech, WDTL provides no new legal authority. WDTL merely repeats WaferTech's futile attempt to transform the trial court's dismissal, which was based purely on delay and inaction by BSA after remand, into one for

"unacceptable litigation practices" and necessary to relieve the burden on trial courts in general.

B. Argument

1. WDTL repeats WaferTech's arguments.

Without providing any new legal authority, WDTL repeats WaferTech's arguments that (1) allowing the trial court to destroy its copies of exhibits from a prior trial, and a withdrawal of counsel, constitute "unacceptable litigation practices" and (2) budget problems of trial courts support dismissal of claims that would be burdensome to adjudicate. BSA has previously briefed these issues, so they will only be cursorily addressed here.

a. Allowing the trial court to destroy its copies of exhibits from a prior trial and a withdrawal of counsel are not "unacceptable litigation practices" that warrant dismissal of an action.

Washington courts, while not providing an express definition of what is an "unacceptable litigation practice," have been consistent in determining that they are actions which impede the litigation, rather than neutral actions that neither impede nor advance the litigation. The examples of "unacceptable litigation practices" include violating court orders and failing to show up for hearings or trial. That is not what BSA did here, nor did BSA do anything similar.

On this issue, WDTL cites only cases previously cited and discussed by the parties. *Gott v. Woody*, 11 Wn.App. 504, 524 P.2d 452 (1974); *Snohomish Co. v. Thorp Meats*, 110 Wn.2d 163,750 P.2d 1251 (1988); *Foss Maritime Co. v. Seattle*, 107 Wn.App. 669, 27 P.3d 128 (2001); *Wallace v. Evans*, 131 Wn.2d 572, 934 P.2d 662 (1996). None of these cases provide support for characterizing (1) the failure to object to the trial court's destruction of copies of exhibits and (2) a withdrawal of counsel as "unacceptable litigation practices" warranting dismissal.

In arguing that BSA engaged in "unacceptable litigation practices" warranting dismissal, WDTL ignores the complete lack of a record to support that argument. There is no such record because WaferTech moved for dismissal based on BSA's delay and failure to prosecute, not "unacceptable litigation practices." WaferTech's motion to dismiss contained this Summary of Argument:

> This Court has inherent authority to dismiss a case for a party's *failure to timely prosecute* its claims after remand. BSA *failed to prosecute* its claims after remand many years ago, resulting in unfair prejudice to WaferTech and undue burden on this Court. Accordingly, this Court should exercise its inherent authority to dismiss BSA's claims because of BSA's unjustified and prejudicial *delay* in prosecuting its claims after remand.

CP 60 (emphasis added).

WDTL repeatedly asserts, without reference to the record, that WaferTech and the trial court were prejudiced by BSA's inaction and withdrawal of counsel. There was no finding of prejudice by the trial court, nor did the order of dismissal assert prejudice. CP 97-99.

In regards to BSA's inaction allowing the trial court to destroy the court's copies of exhibits, the record shows WaferTech was not prejudiced by that occurrence. WaferTech's counsel, in support of WaferTech's motion to dismiss, stated that some time after March 2005, his firm "sent its files in this case (consisting of 327 boxes of materials) for archiving to an offsite storage facility." CP 52. There is no other mention of these files. It can be inferred that those files contain originals or copies of all the exhibits from the first trial, and that those files and exhibits are still intact. The trial court's destruction of its copies of exhibits had no effect, prejudicial or otherwise, on WaferTech.

As to the withdrawal by BSA's prior counsel and the statement that the action had been "dismissed," there is again no indication in the record WaferTech or its counsel was prejudiced in any way by this. This withdrawal was so inconsequential that WaferTech never even brought it to the attention of the trial court in its motion to dismiss or the supporting papers. CP 49-70, 86-96. WaferTech, and now WDTL, has only latched

onto the withdrawal, and the wording of the withdrawal, as part of this appeal.

WDTL then laments that without dismissal as a sanction, trial courts and defendants would be at the mercy of procrastinating plaintiffs, not knowing when or if an action would be noted for trial. This ignores CR 41(b)(1), which entitles a defendant to move to dismiss an action if it is not noted for trial within one year of issues being joined. It also ignores CR 41(b)(2), which permits the clerk to seek dismissal when there has been no activity for one year. Finally, it ignores CR 16, which allows the trial court to set a case schedule, with all the sanctions of CR 37 (including dismissal) available to punish a party who violates the schedule. Tegland, 3A *Wash. Prac.: Rules Prac.*, p. 354 (2006). In short, there are numerous remedies available to defendants and the trial court to protect defendants such as WaferTech.

In addition, WDTL does not explain why the harshest sanction possible, dismissal, which adversely affects only plaintiffs, not WDTL members and other defendants, is the only possible sanction if BSA's conduct was deemed "unacceptable litigation practices." BSA, in its Supplemental Brief, at pp. 11-13, addressed the trial court's obligation to impose, or at least consider, a lesser sanction than dismissal if it found

BSA had engaged in "unacceptable litigation practices." (The trial court made no such finding, nor considered any lesser sanction.)

b. Budgetary problems of trial courts do not warrant the dismissal of actions the trial court would find burdensome to adjudicate.

The budget problems faced by trial courts are serious. However, the solution is not dismissing actions without warning to unsuspecting plaintiffs who have merely delayed in litigating their claim, no matter how burdensome the action will be on the trial court. Whatever burden the present action will place on the trial court is in the nature of the action, not the delay in bringing it to trial.

The newspaper article cited by WDTL regarding declining budgets for trial courts contradicts the position urged by both WDTL and WaferTech in this appeal.[1] The article is written by the Hon. Stephen M. Warning, president of the Superior Court Judge's Association of Washington state. In addressing problems in court funding, he does not seek an expansion of trial court judges' case management powers to include dismissing cases to ease the burdens on trial courts. Instead, he describes the people trial courts serve, including "the small business owner who needs a contract dispute decided to stay in business."

[1] Stephen M. Warning, "With Budget Cuts, Courts May Struggle to Retain Order in Society," *The Olympian* (30 Apr. 2011), available at http://www.theolympian.com/2011/04/30/1635157/with-budget-cuts-courts-may-struggle.html (last viewed October 11, 2011).

To urge citizens to address this funding problem, Judge Warning points out that "[J]ustice is the business of government." A functioning court system is a "fundamental responsibility" of government, without which "democracy is at risk."

WDTL seeks the opposite of what Judge Warning seeks. WDTL seeks a court system which denies citizens an adjudication on the merits of their claims, in the name of case management. That is not justice. It is bad enough the trial court wrongfully dismissed BSA's lien claim in 2002, an error the Court of Appeals corrected in 2005. It would be an injustice for this court to uphold the trial court's dismissal of BSA's lien claim, prior to any adjudication on the merits, merely because it would be burdensome for the trial court to adjudicate.

Having addressed WDTL's rehash of WaferTech's arguments, next is the new issue raised by WDTL, which is judicial estoppel.

2. Judicial estoppel does not apply to statements by counsel in a notice of withdrawal in the same action.

WDTL argues judicial estoppel supports the trial court's dismissal, despite the fact that the trial court did not rely on that doctrine, and even a cursory review of the doctrine of judicial estoppel shows it has no application here.

Judicial estoppel bars a party from taking a position in a second action that is "clearly inconsistent" with a position in an earlier action. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009). It is intended to promote respect for judicial proceedings without resort to perjury statutes. *Johnson v. Si-Cor, Inc.*, 107 Wn.App. 902, 906, 28 P.3d 832 (2001). The later position must be diametrically opposed, not just inconsistent, with prior sworn testimony. *Seattle-First Nat'l Bank v. Marshall*, 31 Wn.App. 339, 343, 641 P.2d 1194 (1982). Application of the doctrine "may be inappropriate when a party's prior position was based on inadvertence or mistake." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007).

Here, WDTL asserts that the statement by BSA's prior counsel in its Notice of Withdrawal that the action was "dismissed" warrants using judicial estoppel to bar BSA's claim, but there is only one action, so the requirement of two actions is not met. In addition, the statement in the Notice of Withdrawal is not prior sworn testimony, nor "clearly inconsistent," much less "diametrically opposed" to BSA's present position. It was true that all of BSA's claims had been dismissed (the lien claim was reinstated in the prior appeal), and BSA is not now pursuing the other dismissed claims. Finally, the statement that the action had been dismissed, to the extent that judicial estoppel is expanded to apply to a

single action, was mistaken, as the Court of Appeals had reversed the first dismissal of the lien claim, remanding it to the trial court. Judicial estoppel does not apply.

C. Conclusion

WDTL provides no additional support for WaferTech's arguments, nor does the newly raised issue of judicial estoppel apply. BSA asks that this Court affirm the Court of Appeals ruling, clarifying that "unacceptable litigation practices" that would warrant sanction, including dismissal, must be those that impede the litigation. They do not include mere delay or the benign acts by BSA in this action.

DATED this 26th day of October, 2011.

HULTMAN LAW OFFICE

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by mailing the same via mail, properly addressed and prepaid, and e-mailing, on the 26th day of October, 2011, to:

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Clerk:

I attach for filing the Reply Brief of Appellant/Respondent BSA to Amicus Brief by WDTL in the above-referenced appeal. I am also sending it to other counsel who have appeared in the appeal. Oral argument in the appeal is scheduled for November 8th.

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